

portion of the Timber Lake exchange frustrates tribal governmental determinations regarding the operation and regulation of the tribal telephone business. Consequently, the Commission's actions are barred under federal law by infringement and the Court should reverse them.

B. FEDERAL PREEMPTION BARS THE COMMISSION FROM ASSERTING JURISDICTION OVER THE SALE OF THE ON-RESERVATION PORTION OF THE TIMBER LAKE EXCHANGE.

In addition to the bar of infringement, federal preemption bars the Commission from asserting its authority over the sale by U S WEST of that portion of the Timber Lake exchange located on the Cheyenne River Indian Reservation. Federal preemption consists of two elements: 1) a federal program or policy that benefits Indian tribes and their members; and 2) a frustration of federal purpose by state action without a legitimate interest and a compensating benefit back to the tribe. Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965); Bracker, 448 U.S. at 143-44; Central Machinery Company v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. at 333-34; Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Department of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994).

The federal program in New Mexico v. Mescalero Apache Tribe derived from legislation encouraging the economic

development of reservation economies such as the Indian Financing Act of 1974. 462 U.S. at 335. To that end, the Department of the Interior had taken steps pursuant to that legislation to establish in conjunction with tribal wildlife officials a healthy wildlife population. The Court found a preemption of New Mexico's efforts to apply its own game laws on the reservation because there was no legitimate state interest which provided a compensating benefit back to the tribal beneficiaries of the federal program. Significantly, New Mexico's desire to maintain revenues from license fees and federal matching funds was insufficient to justify state jurisdiction. Id. at 342-43.

Likewise the Commission's assertion of authority here is preempted by the congressional plan encouraging tribal economic development and self-sufficiency. This is based on Presidential pronouncements as well as many Congressional initiatives. "Economic deprivation is among the most serious of Indian problems. . . . [I]t is critically important that the federal government support and encourage efforts which help Indians develop their own economic infrastructure." President of the United States, Recommendations for Indian Policy, H.R. Doc. No. 91-363, at 7 (1970). See also President Reagan's Proclamation 5049, 48 Fed. Reg. 16227 (Apr. 14, 1983). Among the many congressional initiatives to advance economic development on Indian reservations are: the IRA; the Indian Financing Act

of 1974, 25 U.S.C. §§ 1451-1544; the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n, 455-458e; the Tribal Economic Development and Technology Related Education Assistance Act of 1990, 25 U.S.C. §§ 1801, 1851-1852; and the Indian Higher Education and Post-Secondary Economic Development Scholarship Program, 25 U.S.C. §§ 3334, 3351-3355.⁶

The Commission has no interest other than keeping out of tribal hands the telephone service provided in the Timber Lake exchange. The undisputed evidence demonstrates that the Telephone Authority would provide more than adequate, state-of-the-art service. Federal preemption, therefore, bars the Commission from asserting its authority over the sale of the on-Reservation portion of the Timber Lake exchange.

C. THE COMMISSION'S DENIAL OF THE SALE OF THE ON-RESERVATION PORTION OF THE TIMBER LAKE EXCHANGE VIOLATES WELL-ESTABLISHED PRINCIPLES OF FEDERAL INDIAN LAW.

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877 (1986) ("Wold II"), bars the Commission from obtaining jurisdiction that it

⁶ Other Supreme Court cases relying at least in part on Congress' economic development legislation for purposes of establishing a federal scheme are: Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155-156 (1980), White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-144 (1980), Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 840-841 (1982). See also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216-218 (1987).

otherwise lacks over the on-Reservation portion of the Timber Lake exchange by implicitly conditioning its approval for the sale on a relinquishment by the Tribe of its tribal sovereignty and political integrity. In Wold II, the plaintiff, an Indian tribe, brought an action against Wold Engineering, a non-Indian entity, in North Dakota state court for breach of contract and negligence. In 1963, North Dakota amended its law under Pub. L. 280 to restrict access to state courts by allowing jurisdiction in its courts over suits by Indians against non-Indians "upon acceptance by Indian citizens" of such jurisdiction. Wold II, 476 U.S. at 880. The tribal plaintiff had not "accepted" jurisdiction under this North Dakota enactment.

The North Dakota court concluded that the effect of the enactment was to require a waiver of tribal sovereign immunity and a tribal acceptance of the applicability of state law in all suits to which it is a party. Id. at 887-88. Consequently, the North Dakota court concluded that the state courts lacked jurisdiction over the action because of the failure of the tribal plaintiff to "accept" such jurisdiction by waiving its immunity.

The United States Supreme Court reversed the North Dakota court, in three analytical steps.⁷ First, the Court

⁷The Circuit Court relied upon the Supreme Court's reasoning in Wold II when it reversed the Commission on the first appeal from the Commission's decisions on this and other issues, and remanded the case back to the Commission on those issues. App. 4 at pp. 50-51.

noted that ensuring access to the courts for all citizens was a "weighty" federal interest. Second, the Court noted that tribes had no meaningful alternative to state court in this particular case. Id. at 888-89. Third, it rejected Wold Engineering's argument that the Tribe retained its access because it "merely" had to accept the statutory conditions in order to use the state court system and concluded:

Simply put, the state interest, as presently implemented, is unduly burdensome on the federal and tribal interests. . . . The North Dakota jurisdictional scheme requires the Tribe to accept a potentially severe intrusion on the Indians' ability to govern themselves according to their own laws in order to regain their access to the state courts.

Id. The Supreme Court noted that, "[t]his result simply cannot be reconciled with Congress' jealous regard for Indian self-governance." Id. at 890 (citations omitted). In the end, "the State's interest is overly broad and overly intrusive when examined against the backdrop of the federal and tribal interests implicated in this case." Id. at 893 (citations omitted).

Just as access to the courts in Wold II is a "weighty" federal interest, so too is the federal interest in economic development for Indian tribes. See part I(B), supra. See also TR at 770-79.⁸ The Commission's decision on the sale

⁸The principles announced in Wold II also apply to the Morristown and McIntosh exchanges and off-Reservation part of the Timber Lake exchange. See Argument II(D), infra.

of the on-Reservation portion of the Timber Lake exchange, if upheld, would be precedent for the same result in the case of Indian acquisition or operation of any traditionally state-regulated business in which Indians transact business with non-Indians on their reservations. The consequent limited spectrum of economic activity on the Reservation and the level of economic health attainable in that case by Indian business enterprise and reservation economies would fall far short of the well-established goals of the legislative and executive branches. See Argument I(B), supra. See also TR at 770-79.

As in Wold II where there was no alternative to access to state courts, here the Tribe has no meaningful alternative to purchasing these three exchanges if it wishes to expand its telephone business. It would be economically foolhardy in this rural setting to construct a redundant infrastructure and compete with U S WEST. Alternatively, purchasing access from U S WEST at wholesale and reselling telephone service at retail would require the Commission to consider, among other issues, the same issue raised in this case with presumably the same outcome absent a reversal by this Court. App. 12 at 105 (Appellee's Brief, No. 97-348 (Dec. 19, 1997)). See, e.g., 47 U.S.C. § 252(e)(2)(A)(ii) (state commissions may withhold approval for resale of services if such "is not consistent with the public interest, convenience, and necessity.").

Although on remand the Commission in its amended Timber Lake order refrained from explicitly conditioning its denial of the sale on a "waiver" by the Telephone Authority, the implication is clear that it would approve the sale only if the Telephone Authority would submit to State authority to regulate and tax its operations on the Reservation. This is precisely the "unduly burdensome" and "overly intrusive" action forbidden by Wold II.

II. THE COMMISSION'S DECISIONS SHOULD BE REVERSED PURSUANT TO SDCL 1-26-36 BECAUSE THE SALES OF THE OFF-RESERVATION PORTION OF THE TIMBER LAKE, AND THE MORRISTOWN AND MCINTOSH TELEPHONE EXCHANGES MEET THE REQUIREMENTS OF SDCL 49-31-59.

A. INTRODUCTION.

SDCL 49-31-59 requires the Commission to consider six factors related to the quality of service and the payment of taxes. See Statement of the Case and Facts, § B, supra. Although the Telephone Authority satisfied the statutory criteria, the Commission denied the sales noting that the Telephone Authority had acknowledged that the State may impose its gross receipts tax on sales to non-members but that the State "has no mechanism whereby to force the tribe to collect the tax." MCFF2 13, App. 7 at p. 80; MOFF2 13, App. 6 at p. 70; TLFF2 13, App. 8 at p. 90.

There is a vast difference between applicability of state law to Indians on and off their reservations. Nevertheless, the Commission drew no distinction between the

portion of the Timber Lake exchange located off the Cheyenne River Indian Reservation, the Morristown and McIntosh exchanges (referred to collectively as the "off-Reservation exchanges"), and the Reservation portion of the Timber Lake exchange. In fact, the Commission had ample authority to impose enforceable conditions on the off-Reservation sales and to maintain effective regulatory authority over subsequent operations. In any event, the statute's terms do not permit the Commission to rest its decision on factors not even set forth in SDCL 49-31-59, namely the extent of the Commission's continuing regulatory authority over the exchanges after the sale and the sovereign immunity of the Telephone Authority. Likewise, the State has ample authority to apply its tax laws to the operation of the off-Reservation exchanges. Finally, federal law establishes that tribal sovereign immunity does not, as a practical matter, preclude the exercise of legitimate state authority and, moreover, may not be imposed as a barrier to tribal participation in state-sanctioned activities.

B. BASED ON ITS FINDINGS OF FACT AND AVAILABLE ENFORCEMENT ALTERNATIVES, THE COMMISSION SHOULD HAVE FOUND THAT THE SALES OF THE OFF-RESERVATION EXCHANGES SATISFIED THE STATUTORY CRITERIA RELATED TO THE QUALITY, SCOPE AND COST OF SERVICE.

The Commission erred in concluding that it could not impose conditions on the sale of the off-Reservation exchanges, or continue to regulate those exchanges after the sales. The Commission further underestimated the

alternatives available to it to enforce its authority.

1. The Commission Had Authority to Impose Conditions on the Off-Reservation Sales.

In this appeal, the Telephone Authority and U S WEST do not challenge the Commission's jurisdiction over the sales of the off-Reservation exchanges. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973).⁹ Thus, the Commission's jurisdiction over the sales of the off-Reservation exchanges cannot be denied.

The Commission's position is anomalous. On the one hand, it claims jurisdiction over the sales of the off-Reservation exchanges. On the other, it asserts that it lacks authority to condition those sales. It cannot have it both ways. Because the Commission has jurisdiction over the sales of the off-Reservation exchanges, it has authority to condition those sales just as with the 63 exchanges for which it approved the sales.

Left unsaid, but implicit in its decisions and arguments, is the Commission's lingering concern that the

⁹Although SDCL 41-39-59 is facially neutral, the Commission applied the statute in an erroneous manner to discriminate against the Telephone Authority on account of the characteristics with which it is endowed under federal law. See Argument III infra.

sovereign immunity of the Telephone Authority would frustrate its enforcement of any conditions which it imposes. That concern is misguided. The United States Supreme Court has recognized that tribal sovereign immunity does not stand as a bar to states to enforce the collection of state taxes on transactions between Indian tribes and non-Indian consumers. In Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991), the Court held that the State of Oklahoma could tax the sale of cigarettes to non-Indians by a tribally owned convenience store and that the tribe could be required to assist in the collection of such taxes. Oklahoma complained that without a waiver of sovereign immunity it had "a right without any remedy." Id. at 514. The Court was not persuaded: "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives." Id. The Court mentioned the possibility of officer suits, actions against the wholesalers or "agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." Id.

The same reasoning applies here. Oklahoma Tax Comm'n establishes that the Supreme Court does not view sovereign immunity as a meaningful barrier to the assertion of legitimate state regulatory authority, even on the Reservation. The Commission erred in concluding that it

could not impose conditions on the sales of the off-Reservation exchanges.

2. The Commission Will Have Continuing Regulatory Authority Over the Off-Reservation Exchanges After the Sales.

The Commission relied heavily on its perception that it would lose regulatory authority over the exchanges after the sales, drawing no distinction between on and off-Reservation exchanges. The Commission viewed its purported loss of regulatory authority as contrary to the public interest. The Commission's concerns -- which permeated its denial of the sales -- are flatly wrong. As Mescalero Apache Tribe v. Jones establishes, the Commission will retain regulatory authority over the off-Reservation exchanges even after the sales to the Telephone Authority and thus will be able to protect the public interest.

To be sure, holdings of federal courts of appeal suggest that the Telephone Authority would continue to possess tribal sovereign immunity for activities occurring off the Reservation. See In re Green, 980 F.2d 590, 596 (9th Cir. 1992); Bank of Okla. v. Muscogee Nation, 972 F.2d 1166, 1170 (10th Cir. 1992). But the question whether tribal sovereign immunity reaches beyond reservation boundaries presently is before the United States Supreme Court. See Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., (Okla. Ct. App. June 28, 1996), cert. granted, 117 S.Ct. 2506 (1997). The question is, therefore,

unanswered, but in any event, the Commission will have adequate alternatives to ensure that it can satisfy its legitimate regulatory concerns. Oklahoma Tax Comm'n, 498 U.S. at 514.

3. Continuing Authority over the Exchanges After the Sales is Not a Statutory Element.

The Commission did not find that the sale of the off-Reservation exchanges would actually violate any of the statutory criteria in SDCL 49-31-59, but only that the public interest may be affected in the future by the Tribe's sovereign immunity. The Commission exceeded its statutory mandate.

First, nothing in SDCL 49-31-59 requires the Commission to consider whether it will maintain post-sale authority over the exchanges. "Words and phrases in a statute must be given their plain meaning and effect." U S WEST Communications, Inc. v. Public Util. Comm'n, 505 N.W. 2d 115, 123 (S.D. 1993). The Commission, like a court, "must confine itself to the language used." Id. The Commission's error in this regard is especially egregious because there is nothing in the record to show that lack of Commission jurisdiction would actually affect the service in the exchanges. The Commission's assumption that in the absence of its regulatory authority, the Telephone Authority would not continue to provide service in accordance with the standards actually articulated in the statute was mere

speculation.

Second, the Commission erred as a matter of law in concluding that the effect of tribal sovereign immunity on its continuing regulatory authority was not in the public interest. Federal policy and federal law have established a regulatory system in which tribes like other sovereigns generally are immune from suit. The status of tribes under federal law is a product of the lengthy legal history that surrounds the federal recognition of tribes, tribal relinquishment of extensive land holdings and a federal Indian policy that has sought to balance sometimes conflicting Indian and non-Indian interests. The allocation of regulatory authority consistent with federal law cannot be contrary to the public interest. See, e.g., In re Public Service Co. of N.H., 108 B.R. 854, 871-72 (1989) (Congress intentionally created a "dual-regulatory system" in the country for public utilities, and "Congress had already considered the public interest when it withdrew considerable regulatory authority from the states in its FERC legislation").

Where federal law impinges upon a state's ability to regulate public utilities, there is not a sacrifice of the public interest factor. Rather, there is merely a shift to a shared regulatory relationship between the state and the federal government, but the public interest is still protected. See also, Smith v. Babbitt, 875 F.Supp. 1353,

1370 (D. Minn. 1995). The Commission erred in concluding that the effect of tribal sovereign immunity on its continuing regulatory authority over the off-Reservation exchanges was not in the public interest. By definition, a regulatory system that flows from the laws and policies of this Nation must be in the public interest.

C. THE STATE OF SOUTH DAKOTA HAS ADEQUATE ALTERNATIVES TO ENFORCE THE PAYMENT OF TAXES AND THE COMMISSION SHOULD NOT HAVE DISAPPROVED THE SALES OF THE EXCHANGES ON THAT GROUND.

Perhaps the greatest confusion over the proposed sales revolved around the payment of taxes. As the Commission acknowledged, under Mescalero Apache Tribe v. Jones, its argument that the state gross receipts tax would not apply after the sales is not correct for the McIntosh and Morristown exchanges, or the off-Reservation portion of the Timber Lake exchange. 411 U.S. at 148-49. See Appellee's Brief at 26 n.4, No. 97-348 (Dec. 19, 1997). Mescalero Apache Tribe v. Jones is directly on point with regard to the off-Reservation exchanges, and answers the questions regarding payment of taxes associated with those off-Reservation exchanges.

The Commission erred when it concluded that the State did not have adequate alternatives to enforce the collection of gross receipts taxes for the off-Reservation exchanges. As Oklahoma Tax Comm'n counsels, "adequate alternatives" exist, even in the face of tribal sovereign immunity, to

ensure that legitimate state taxes owed on transactions between the Telephone Authority and non-members are paid to the State. 498 U.S. at 514. In particular, the Telephone Authority has expressed its willingness to enter into a gross receipts tax collection agreement with South Dakota.¹⁰ Accordingly, the Commission erred in finding that the payment of taxes was a factor against approval of the off-Reservation sales.

D. THE COMMISSION MAY NOT DENY TO THE TELEPHONE AUTHORITY THE OPPORTUNITY TO PURCHASE BUSINESSES IN SOUTH DAKOTA ON ACCOUNT OF THE TELEPHONE AUTHORITY'S IMMUNITY FROM SUIT.

The Commission in its original decisions on the sales of the three exchanges explicitly stated that it denied the sales to the Telephone Authority because the Telephone Authority refused to waive its sovereign immunity. The Circuit Court correctly held that the Commission's decisions violated federal law and remanded the decisions to the Commission. App. 4 at 23. On remand, the Commission merely redrafted the original decisions to eliminate the explicit reference to sovereign immunity but continued to rely virtually exclusively on the immunity of the Telephone

¹⁰In 1976, the Tribe negotiated and entered into a sales tax collection agreement with South Dakota, which agreement has been in force and effect for 19 years. See SR1 3285. In 1985 and 1987, the Tribe enforced the agreement against two of its members who had refused to collect the tax, thereby forcing the members' businesses to close. The 19 year history of the Tribe's sales tax collection agreement with South Dakota demonstrates that taxation and regulatory agreements work well. SR1 3285, 3396.

Authority as justification to refuse to approve the sales of the off-Reservation exchanges.

The Commission's decisions on the off-Reservation exchanges were thus doubly defective. First, Oklahoma Tax Comm'n demonstrates that even in the face of tribal sovereign immunity, "adequate alternatives" exist to implement the legitimate exercise of state authority. 498 U.S. at 514. As a result, no basis exists to deny the sales under SDCL 49-31-59. Second, federal law prevents the Commission from denying to the Telephone Authority the same opportunities that are available to other citizens of South Dakota outside Reservation boundaries merely because the Telephone Authority, as a tribal entity, is immune from suit under federal law. Wold II, 476 U.S. at 893; Argument I(C), supra. In sum, the Commission's denial of the off-Reservation sales on account of the Telephone Authority's sovereign immunity does not withstand scrutiny under the applicable law.

III. THE REFUSAL OF THE COMMISSION, BASED ON ITS INTERPRETATION OF SDCL 49-31-59, TO APPROVE THE JOINT APPLICATION FOR THE SALES OF ALL OF THE TELEPHONE EXCHANGES CONSTITUTES A DENIAL OF EQUAL PROTECTION UNDER THE LAW.

By relying on the potential effect of the Telephone Authority's sovereign immunity to deny the exchange sales, the Commission treated the Telephone Authority disparately from all other successful bidders in violation of the U.S.

Const. amend. XIV and S.D. Const. art VI, § 18.

A. THE STRICT SCRUTINY TEST APPLIES TO ANALYZE THE COMMISSION'S APPLICATION OF SDCL 49-31-59 FOR EQUAL PROTECTION COMPLIANCE.

The strict scrutiny test is appropriate for examining whether the Commission's application of SDCL 49-31-59 passes equal protection analysis. "The first part of the test is 'whether the statute does set up arbitrary classifications among various persons subject to it.' The second part of the test is the application of the appropriate standard of review to the arbitrary classification." South Dakota Physician's Health Group v. State, 447 N.W.2d 511, 515 (S.D. 1989) (quoting Wieber v. Hennings, 311 N.W.2d 41, 42 (S.D. 1981)).

Under the first part of the test, the Commission's application of SDCL 49-31-59 to deny the exchange sales to the Telephone Authority arbitrarily classifies the Telephone Authority as ineligible to purchase the exchanges because of the effect of its sovereign immunity. None of the other purchasers had sovereign immunity, and the Commission approved 63 out of 64 of the sales to purchasers other than the Telephone Authority.¹¹ Like the statute at issue in

¹¹The Commission denied the sale of the Alcester exchange to Beresford Municipal Telephone Company because state law prohibits a municipal telephone company from operating outside its municipality, and the Alcester exchange lies outside of the Beresford municipality. See *Decision and Order Regarding Sale of the Alcester Exchange* at 6 (conclusion of law 4), No. TC94-122-Alcester (Aug. 1, 1995), SR1 19,472.

South Dakota Physician's, the Commission's interpretation of SDCL 49-31-59 "does not apply equally to all" 447 N.W.2d at 515.

Under the second part of the test, the applicable standard of review of the Commission's arbitrary classification is the strict scrutiny standard.

"Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." Plyler v. Doe, 457 U.S. 202, 216-17 n. 14 (1982). Accord Gulch Gaming, Inc. v. South Dakota, 781 F. Supp. 621, 630 n. 7 (D.S.D. 1991); Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Disparate treatment of individuals based on circumstances beyond their control is impermissible whether it is express or whether the statute's impact singles out a group of citizens. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Alabama & Coushatta Tribes v. Big Sandy Sch. Dist., 817 F. Supp. 1319, 1336 (E.D. Tex. 1993), remanded by, 20 F.3d 469 (5th Cir. 1994). The United States Supreme Court has left open the question whether Indian Tribes constitute a suspect class, and therefore whether the strict scrutiny test would apply to evaluate the constitutionality of the state statute. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 157 (1984) ("Wold I") (because of remand

to state court, the Supreme Court did not pass on whether state statute denying Indian tribal members access to state court violated their right to equal protection of the law). Neither has this Court passed on the question.¹²

The Telephone Authority, as an entity of the Tribe, has sovereign immunity as a matter of federal law, a circumstance beyond its control, see Transcript of Feb. 11, 1998 Oral Argument at 27, and therefore the strict scrutiny test is appropriate for examining the constitutionality of the Commission's application of SDCL 49-31-59 to deny the telephone exchange sales. There is no question the Commission failed to apply SDCL 49-31-59 equally to all applicants who sought to purchase and operate telephone exchanges in South Dakota. Id. In short, the Commission's application of SDCL 49-31-59 denies the Telephone Authority, and potentially all Indian tribes and tribal entities, the equal protection of the law.

In addition to the threshold inquiry as to the application of a statute so as to disadvantage a suspect class, there are two additional components of the strict scrutiny test. First, the aggrieved party must demonstrate that an improper purpose underlies the offending

¹²The Arizona Superior Court recently held that "Indian tribes are a suspect class under equal protection analysis." Decision at 43, In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, Nos. W-1 (Salt), W-2 (Verde), W-3 (Upper Gila), W-4 (San Pedro) (Ariz. Super. Ct. Aug. 30, 1996).

legislation. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266 (1977). Second, in such circumstances, only if the state can "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest" will the statute survive. Plyler, 457 U.S. at 217.

B. THE COMMISSION'S APPLICATION OF THE STATE STATUTE TO DENY THE SALES IS FOUNDED UPON AN IMPROPER PURPOSE.

As applied to the Telephone Authority, an improper purpose plagues SDCL 49-31-59 . Evidence of improper purpose may include, "[t]he specific sequence of events leading up to the challenged decision . . . [and] [d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." Village of Arlington Heights, 429 U.S. at 267 (citations omitted). In sum, "certain forms of legislation, while not facially invidious, nonetheless give rise to recurring constitutional difficulties" Plyler, 457 U.S. at 217.

The Commission did not apply SDCL 49-31-59 correctly to the Telephone Authority. See Argument II, supra. If it had, it would have found that the sales satisfied the statutory criteria and would have approved them. Id. A discriminatory purpose underlies the administrative application of the facially neutral SDCL 49-31-59:

The unlawful administration by state officers of a state statute fair on its face, resulting in its

unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself.

Snowden v. Hughes, 321 U.S. 1, 8 (1944) (citations omitted).

See also Alabama & Coushatta Tribes, 817 F. Supp. at 1336.

The Commission's erroneous and disparate application of SDCL 49-31-59 constitutes an improper purpose.¹³

Assuming arguendo that the Commission applied the statute correctly, and it was indeed meant to preclude all tribal entities with sovereign immunity from purchasing the telephone exchanges in South Dakota, an improper purpose underlies SDCL 49-31-59 itself. Prior to the statute's enactment, the Commission was not required to approve telephone exchange sales. Instead, sellers and buyers were free to sell and buy exchanges under vague standards which

¹³ The Circuit Court's remarks were nonetheless very telling with regard to the issue of disparate treatment:

[t]he Tribe has some very unique characteristics that are rightfully protected under federal law, but nevertheless, what's involved here is someone is asking to purchase a commercial enterprise that really -- well, they exist all throughout the State of South Dakota. And the fact that the Tribe comes to the table with some different characteristics . . . that may make it more difficult for them . . .

Transcript of Feb.11, 1998 Oral Argument at 27 (emphasis added).

the Commission had approved. See SDCL 49-31-20, 49-31-21. It is appropriate to assume that the South Dakota Legislature knew that issues existed over the extent to which Indian tribes and tribal entities may be taxed and regulated by the state. Cannon v. University of Chicago, 441 U.S. 675, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law"); Director, OWCP v. Perini North River Associates, 459 U.S. 297, 319 (1983); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988). Thus, for purposes of argument, if the statute was intended to preclude the purchase of the exchanges solely because of the Telephone Authority's sovereign immunity, the statute improperly discriminates against tribal entities on account of characteristics with which they are endowed by federal law.

In the end, the effect of the administrative action which resulted in the denial of the telephone exchange sales to the Telephone Authority is an improper purpose that prevents the Commission's application of SDCL 49-31-59 from surviving this prong of equal protection analysis.

C. THERE IS NO COMPELLING GOVERNMENTAL INTEREST.

The burden is on the State to show that a compelling state interest exists which can override the discriminatory impact of the statute. Plyler, 457 U.S. at 217. See also Gulch Gaming, 781 F. Supp. at 630-31. Thus, "if the

constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional [or legislative] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973). The determination that the Commission cannot enforce the collection of taxes or regulation of the Telephone Authority based upon its sovereign immunity and consequently that the sales to the Telephone Authority would not be in the public interest does not constitute a precisely tailored, compelling governmental interest.

The effect of the Commission's decisions is to sanction discrimination against a suspect group -- Indian tribes and tribal entities that seek to own and operate telephone exchanges within the state of South Dakota.

IV. THE CIRCUIT COURT AND THE COMMISSION ABUSED THEIR DISCRETION BY FAILING TO REOPEN THE RECORD

The Circuit Court remanded the Commission's initial decision "on the record."¹⁴ App. 4 at p. 62. What the

¹⁴ The Circuit Court used the following language:
The Commission's decision is . . . reversed and remanded on the record because the Commission improperly conditioned its approval upon the CRSTTA's refusal to waive its sovereign immunity, because the decision was based upon the Commission's erroneous conclusion that SDCL 49-31-17 prohibited approval of the proposed sales, and because the Commission did not enter findings of fact on each of the statutory factors listed in SDCL 49-31-59.

App. 4 at 62 (emphasis added).

Circuit Court meant by this language was the subject of considerable debate. Appellants took the position that the Circuit Court reversed the Commission's decision based on the record before it, while the Commission argued that the Circuit Court used this language to limit the scope of remand. After remand and on the second appeal, the Circuit Court agreed with the Commission. Feb. 11, 1998 Transcript of Oral Argument at 35.

"The decision to remand [a case to an agency for further proceedings] lies within the judicial discretion of the trial court and [this Court's] review is whether it abused that discretion." In re State & City Sales Tax Liability of Quality Service Railcar Repair Corp., 437 N.W.2d 209, 212 (S.D. 1989). "'The term "abuse of discretion" refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence-.'" Pellegrin v. Pellegrin, 574 N.W.2d 644, 646-47 (S.D. 1998) (quoting DeVries v. DeVries, 519 N.W.2d 73, 75 (S.D. 1994)).

The Circuit Court's decision to limit the scope of remand clearly constitutes an abuse of discretion as does the Commission's subsequent decision not to take judicial notice of new and material events which occurred after the record was closed.

The record in this case was closed in June, 1995 and is now almost three years old. The case was first argued to

the Circuit Court on February 2, 1996. On February 21, 1997, a full year later, the Circuit Court issued its 1997 Decision reversing and remanding the Commission's initial decisions.

After the Circuit Court remanded the Commission's decisions, the Standing Rock Sioux Tribal Council issued a provisional certificate of convenience and necessity formally embracing the Telephone Authority's operation of the McIntosh, Morristown and Timber Lake exchanges on the Standing Rock Indian Reservation. App. 10. This action was particularly significant in light of the Circuit Court's concern that by owning and operating telephone exchanges outside the boundaries of the Cheyenne River Indian Reservation, the Telephone Authority would be exercising jurisdiction over non-tribal members. App. 4 at pp. 43-44. The fact that members of the Standing Rock Sioux Tribal Council have determined that it is in the Tribe's best interest for the Telephone Authority to operate the Timber Lake, Morristown and McIntosh telephone exchanges is clearly the type of evidence relied upon by reasonably prudent persons in the conduct of their affairs and thus, should have been considered. SDCL 1-26-19.

With respect to the subscribers of the Timber Lake, Morristown and McIntosh telephone exchanges who are neither members of the Tribe or the Standing Rock Sioux Tribe, the Circuit Court found that the Commission's concern that it